The Leveson Inquiry

culture, practices and ethics of the press

RULING ON THE INQUIRY'S APPROACH TO EVIDENCE

Lord Justice Leveson:

1. One of the most serious issues facing this Inquiry concerns the impact that it could have upon the on-going criminal investigations and any resulting prosecution. Because of these investigations, the Inquiry cannot proceed (as usually occurs in inquiries of this type) by a detailed analysis and determination of all the facts followed by a consideration of what might be appropriate by way of recommendations for the future. In the context of the circumstances arising in this case, to do so would require any prosecution to have been concluded and effectively, therefore, to postponing the hearing of evidence for what might be two or more years. In the light of the public concern which has been evidenced over recent months, that would clearly not be right or appropriate.

2. Neither can the Inquiry be conducted in a factual vacuum without reference to the background which caused it to be set up or without consideration of the extent to which it is correct to be critical of the culture, ethics and practice of the press. To take that course would mean seeking a way forward which was not grounded in what has occurred in the past and, in particular, without any consideration of the issue whether there is a problem that needs solving. This latter concern might have been reduced in significance by what was said at the seminars although it cannot be disregarded.

3. The dichotomy is reflected in the Terms of Reference announced by the Prime Minister (who expressed himself "mindful of the ongoing criminal investigations": Hansard, 13 July 2011, column 311). The Inquiry is thus split into two with Part 1 to precede Part 2 and intended to report within 12 months (ibid, column 312). The Terms are as follows:

   "Part 1

   1. To inquire into the culture, practices, and ethics of the press, including:

      a. contacts and the relationships between national newspapers and politicians, and the conduct of each;

      b. contacts and the relationship between the press and the police, and the conduct of each;

c. the extent to which the current policy and regulatory framework has failed including in relation to data protection; and

d. the extent to which there was a failure to act on previous warnings about media misconduct.

2. To make recommendations:

   a. for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards;

   b. for how future concerns about press behaviour, media policy, regulation and cross-media ownership should be dealt with by all the relevant authorities, including Parliament, Government, the prosecuting authorities and the police;

   c. the future conduct of relations between politicians and the press; and

   d. the future conduct of relations between the police and the press.

Part 2

3. To inquire into the extent of unlawful or improper conduct within News International, other newspaper organisations and, as appropriate, other organisations within the media, and by those responsible for holding personal data.

4. To inquire into the way in which any relevant police force investigated allegations or evidence of unlawful conduct by persons within or connected with News International, the review by the Metropolitan Police of their initial investigation, and the conduct of the prosecuting authorities.

5. To inquire into the extent to which the police received corrupt payments or other inducements, or were otherwise complicit in such misconduct or in suppressing its proper investigation, and how this was allowed to happen.

6. To inquire into the extent of corporate governance and management failures at News International and other newspaper organisations, and the role, if any, of

politicians, public servants and others in relation to any failure to investigate wrongdoing at News International

7. In the light of these inquiries, to consider the implications for the relationships between newspaper organisations and the police, prosecuting authorities, and relevant regulatory bodies – and to recommend what actions, if any, should be taken."

4. The words "culture, practices and ethics of the press" in Part 1 are wider and more general than the terms used in Part 2 and undeniably require the use of a broader brush than will be appropriate when dealing with the individual and specific areas of inquiry identified in Part 2. Nevertheless, obtaining what I have described as a narrative of events sufficient to ground a consideration of the current policy and regulatory framework and the extent (if at all) to which it has failed, remains essential and the question of the proper construction of these terms of reference itself falls to be addressed.

5. It is the issue of identifying a factual narrative that I had in mind when, on 28 July 2011, in my opening public remarks, I said:

> "[W]hereas I am determined not to prejudice any criminal investigation or potential prosecution, I believe that it should be possible to focus on the extent of the problem which would not prejudice an investigation, without examining who did what to whom which might. I have, however, invited the Director of Public Prosecutions to make submissions to me about the extent to which he considers it would be appropriate for me to delve into these matters."

6. Joint submissions have now been received from the Crown Prosecution Service ("CPS") and the Metropolitan Police Service which express anxiety that nothing should be said or done which might jeopardise either the investigation or trial such that "an otherwise credible prosecution might be stopped by the court on the basis that the defendant cannot have a fair trial". This entirely appropriate request is then put as a general proposition that the Inquiry should not rehearse any evidence during Part 1 that is likely to prove central to any criminal proceedings including but not limited to any investigation as to which individuals were aware of possible criminal activity and where they sit or sat within the hierarchy of the named newspaper.

7. The general proposition is then expanded into a serious of specific suggestions and requests advanced by Mr Neil Garnham Q.C. who, for these purposes, acts both for the police and the CPS. These are:

   i) In response to a notice under s. 21 of the Inquiries Act 2005 ("the 2005 Act"), the police and the C.P.S. will prepare an overview document with a detailed narrative of events of interest to the Inquiry with reference to relevant documents to which they have access.

ii) During Part 1 (that is to say until the conclusion of any criminal proceedings) no significant document should be made public which has not already been widely reported. It would not be in the public interest for documents to be discussed publicly before the police have interviewed suspects about them.

iii) The Inquiry should not take evidence from anyone who is a suspect (whether or not he or she has been arrested); the Inquiry should identify who it is intended to call and the police would then confirm whether or not that person was a suspect. That prohibition would extend to showing such a suspect any document and inviting comment: the likely effect would be that the witness would decline to answer, with the real risk of intense public speculation. Thus, it would be suggested that a witness would either have to waive privilege and rehearse a defence in ignorance of the case against them or face criticism for remaining silent in the face of what might be thought to be compelling evidence. Another possibility is that an unscrupulous suspect might use the opportunity to seek to derail a subsequent prosecution.

iv) If the Inquiry receives any material about which the investigating authorities were unaware, it should be provided to the police. On the basis that the Inquiry team would not know what effect any new material might have on one or more suspects, everything new (which presumably means not having emanated from the police) should be provided so that it can receive proper consideration. Presumably, if the police thought it appropriate to identify it as relevant, the subject of an embargo and not utilised by the Inquiry.

8. As a way forward, Mr Garnham suggests that any document that the Inquiry wishes to disclose to other core participants or make public should first be shown to a nominated police officer so that, if necessary, submissions can be made to prevent its use: a document specific ruling would then follow. It is further suggested (although said to be unlikely) that in the event of a challenge to any such ruling, notice would be given promptly within s. 38 of the 2005 Act: thus, the submission is that my decision in respect of any or every document could be subject to an application for judicial review.

9. In more than one way, rigorous adherence to the strictures contained within this submission would substantially increase the work that has to be put into adducing evidence before me and has the potential seriously to damage both the public perception of the Inquiry and its timeliness. Without any privileged knowledge as to the assessment of the police investigating alleged criminal conduct (whether by those employed by the News of the World or otherwise), it is clear that suspects must include all those presently on bail having been arrested and interviewed under caution and, in the light of the way in which the matter has been put, presumably goes beyond that readily identifiable group. If that is right, a wide ranging number of people would not be available whether or not they wished to give evidence or whatever the subject about which counsel to the Inquiry sought to enquire. Further, it would also give rise to the very real risk that the Inquiry becomes emasculated by legal challenge.

10. It is worth adding that, although Mrs Rebekah Brooks is not a core participant, Mr Mukul Chawla Q.C. on her behalf has submitted written representations which, while

repeating her wish to assist the Inquiry, effectively support the submissions advanced by the C.P.S. and the police. He encapsulates the problem that is posed going on baldly to assert:

> "It is not possible properly to inquire into the relationships set out in Part 1 [of the Terms of Reference] without either dealing with the Part 2 issues or ignoring the key issues that resulted in the Inquiry being set up in the first place, in which case the evidence gathering will be distorted to such an extent to be pointless."

The Terms of Reference

11. Although not the subject of specific submission by the core participants, in his capacity as counsel to the Inquiry, Mr Robert Jay Q.C. has analysed the proper construction of the terms of reference and, in particular, the possible argument that the purpose of creating a two part Inquiry has been to prevent the Inquiry addressing any issue that might prejudice the police investigation with the result that it is precluded from so doing: that appears to be the effect of what Mr Chawla submits if distortion is to be avoided. Suffice to say that I do not accept this characterisation of the position. In my judgment, Mr Jay accurately identified that the focus of the inquiry required by Part 1 in this area is the adequacy of the regulatory regime against the background of any systemic behaviour flowing from the ethos or policies of particular media organisations which are either encouraged or tolerated by senior management or, at least, are the consequence of failure of oversight or supervision at that level. Thus, Part 1 and Part 2 are not mutually exclusive and part of the exercise of my discretion must be directed to ensuring that I can do justice to my responsibilities without creating a real risk of prejudice to the parallel criminal investigation and any prosecution.

The Risk of Prejudice

12. Although I am determined not to create a real risk of prejudice either to the present investigation or to any trial, that is not to say that I thereby accept the description of that risk postulated by Mr Garnham. I recognise that both the police and the CPS have had to proceed on the basis that their preferred default position is that nothing which is not in the public domain should be ventilated before the Inquiry: in that way, it cannot be suggested that either has condoned the public deployment of material which, had it not been for my Inquiry, would not have become public knowledge until a criminal trial commences. I also understand that Mr Garnham takes that stance specifically without prejudice to a prosecution submission that, should I take a different view, that course was open to me and the prospects of a fair trial remain unaffected. Before deciding upon the way that I will proceed, it is necessary to consider the prejudice that he identifies: these fall under the headings of prejudice to the criminal proceedings and abuse of process; press reporting and contempt of court; parliament and the *sub judice* rules; and the content, scope and effect of the privilege against self incrimination. I shall deal with each in turn.

Prejudice to the Criminal Proceedings and Abuse of Process

13. Under this heading, Mr Garnham covers three very different risks. The first concerns the impact of the Inquiry upon the witnesses and potential witnesses in the criminal proceedings whose credibility may be affected (or, at least, challenged) if they are vulnerable to suggestion that their account has been altered as a result of information in the public domain. In relation to the core allegation of phone hacking, I am unclear how this might arise although I recognise the concern expressed in *Attorney General v. MGN Ltd & News Group Newspapers Ltd* [2011] EWHC 2074, that the vilification of a suspect might cause witnesses to be reluctant to come forward in his support should that suspect be charged (see para. 35). Given the circumstances of this case (in particular, the very different issues engaged) and the steps that, in any event, I intend to take, I consider this risk to carry little, if any, weight.

14. The second risk concerns the way in which those accused of crime might take advantage of early disclosure of evidence and use the knowledge to interfere with evidence or tailor his or her account thereby interfering with the ongoing investigation. I anticipate that advance disclosure would oblige the police to give notice to a suspect before interview of broad allegations to be put (which I expect would include reference to specific documents) but, in any event, given the general nature of the allegation that is already within the public domain, I do not accept that this risk is of real significance, particularly as I have said on many occasions the focus on the Inquiry will be on culture and practices rather than the detail of precisely who was involved in what.

15. The third risk concerns abuse of process and, in particular, the prospect that it will be suggested that jurors will be affected by pre-trial publicity such that a fair trial is not possible. The hurdle for those seeking to mount such an argument is high not least because the collective experience of all who have been involved in criminal justice is that jurors take their responsibility extremely seriously (as emphasised in *Re B* (2007) EMLR 5 per Sir Igor Judge P at para. 31) to which need only be added the observation that "the drama … of a trial almost always has the effect of excluding from recollection that which went before" (per Lawton LJ in *R v. Kray* (1969) 53 Cr App R 412 at 415).

16. A modern enunciation of the approach can be found in *R v. Abu Hamza* [2007] 1 Cr App R 27 at 345 which concerned a failed application and appeal for a stay on the grounds of adverse publicity notwithstanding what was described as "a prolonged barrage of publicity some of which treated the appellant as an ogre". Lord Phillips CJ put the matter this way (at para. 78):

> "It is customary where there has been publicity prejudicial to a defendant that may have been seen by members of the jury for the court to proceed on the presumption that a jury, if properly directed, will disregard such publicity. Only where the effect of the publicity has been so extreme that it is not possible to expect the jury to disregard it will it be appropriate to stay a trial on the ground of abuse of process."

17. Referring to the observations of Lord Taylor CJ in *R v. West* [1996] 2 Cr App R 374, Lord Phillips CJ summarised (at para 89):

> "89. In general, however, the courts have not been prepared to accede to submissions that publicity before a trial has made a fair trial impossible. Rather they have held that directions from the judge coupled with the effect of the trial process itself will result in the jury disregarding such publicity. ...
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> 93. ... Prejudicial publicity renders more difficult the task of the court, that is of the judge and jury together, in trying the case fairly. Our laws of contempt of court are designed to prevent the media from interfering with the due process of justice by making it more difficult to conduct a fair trial. The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial. In considering this question it is right for the judge to have regard to his own experience and that of his fellow judges as to the manner in which juries normally perform their duties."

18. I recognise that this line of authorities concerns a retrospective analysis of the fairness of a trial in the light of known publicity whereas my concern in this ruling is to consider the question of potential prejudice in advance and without knowing what publicity might be generated by the evidence adduced before the Inquiry. In that regard, although I can control the material put into the public domain by counsel to the Inquiry (and, to some extent, by others who seek to question a witness), the replies to any such question are obviously for the witness. On the other hand, as I have said, the nature of the investigation is directed to culture, practices and ethics and although questions could be directed to the activities and knowledge of named individuals (in respect of which I have no doubt that there is substantial public interest), I am satisfied that it will be possible to maintain the focus that I have identified; questions of individual responsibility clearly fall within Part 2 of the Inquiry which is to follow the conclusion of the criminal investigation and any prosecution. Having said that, however, it should not be thought that this approach does not have consequences: I shall return to this topic at the conclusion of this ruling.

<u>Press Reporting and Contempt of Court</u>

19. In relation to those persons who have been arrested by the police, proceedings are active within the meaning of the strict liability rule: see s. 2(3) and para 3, Schedule 1 of the Contempt of Court Act 1981 ("the 1981 Act"). Thus, strict liability for contempt of court (regardless of intention) is imposed upon any publication which creates a substantial risk that the course of justice in the proceedings in question (that is to say, any criminal trial) will be seriously impeded or prejudiced (see s. 2(2) of the 1981 Act). For these purposes, "publication" includes "any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large or any section of the public" (s. 2(1) of

the 1981 Act). Thus, for the avoidance of doubt, strict liability for contempt covers not only print and broadcasting media but also blogs and other forms of communication over the internet that is available to "any section of the public". Furthermore, liability for contempt of court does not depend upon a conviction being declared unsafe as a consequence of the publication: see the analysis of Lord Judge CJ in *Attorney General v. MGN Ltd & News Group Newspapers Ltd* (*supra*) at paras. 21-28 which made clear that the authority to contrary effect generated by the observations of Sedley LJ in *Attorney General v Guardian Newspapers Ltd* [1999] EMLR 905 (with which the other member of the court, Collins J, did not agree) had "wholly evaporated".

20. Mr Garnham expresses another concern (which Mr Jay shares) about the scope of the contempt jurisdiction and the extent to which it might provide a fetter on the reporting of the proceedings of the Inquiry. Although he recognises that s. 4(2) of the 1981 Act permits the postponement of publication of any report of legal proceedings where it appears necessary for avoiding a substantial risk of prejudice, he considers it open to doubt whether the Inquiry constitutes "legal proceedings" within the 1981 Act at all. Suffice to say that s. 19 of the 1981 Act defines the term court as "including any tribunal or body exercising the judicial power of the state" and provides that "legal proceedings" should be construed accordingly. The question arises whether this Inquiry is exercising "the judicial power of the state". There is no doubt that the contempt jurisdiction was specifically included within the Tribunals of Inquiry (Evidence) Act 1921 and, although there is no such specific provision in the 2005 Act, in my judgment, the power to require co-operation with and participation in the Inquiry on pain of criminal sanction along with the statutory and regulatory provisions as to set up and procedure all point to the Inquiry as exercising the judicial power of the state and (contrary to the bald assertion to the opposite effect in *Public Inquiries* by Beer at para 6.91), I intend to proceed on that basis.

21. As regards what might enter the public domain, Mr Garnham also points to s. 5 of the 1981 Act which provides:

> "A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion."

22. I agree with the submission that the Inquiry will undeniably generate discussion in the press about the evidence publicly available and that this is likely to be discussion in good faith of public affairs or other matters of general public interest but I do not see the vice in such discussion which will be very different from the issues likely to be ventilated in any criminal trial. A criminal trial in relation to conduct of the type presently being investigated will not be concerned with the general issues of culture and ethics but whether the Crown can prove to the criminal standard whether a particular defendant was knowingly involved in what is alleged to be criminal conduct. I would expect the press (and all those who report on the Inquiry) to be as scrupulous as I intend to be to seek to avoid the suggestion that anything published might prejudice the criminal investigation; although I cannot assert it will not happen

(for those intent on mischievous behaviour may not be put off by the threat of contempt), that is a very long way from saying that the integrity of the investigation or any subsequent trial will thereby be put in jeopardy.

Parliament and the *Sub Judice* Rule

23. Although I have substantial control over the material that is generated by and ventilated at the Inquiry, with the power under s. 19 of the 2005 Act to prevent publication of material if I consider it appropriate to do so and with the benefit of the law of contempt should anyone be minded to flout the approach that I will adopt, I readily recognise that these powers do not extend to proceedings in Parliament: Article 9 of the Bill of Rights enshrines the absolute privilege of Parliament and identifies the constitutional principle that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". This approach was confirmed in the report of the Committee on Super Injunctions, 20 May 2011 (see para 6.8) and absolutely nothing I do or say should be taken as questioning that fundamental feature of our constitution.

24. The consequence, however, is that Mr Garnham submits that it is "very likely that there will be parliamentary comment and questions on the evidence adduced and the submissions made in Part 1 of this Inquiry" bringing its own risks to the integrity of the investigation and any trial. In that regard, he points to two further features of the *sub judice* rule (as it applies in Parliament). First, it does not expressly cover criminal proceedings unless and until a charge has been brought (c.f. the position under the 1981 Act). Second, although the rule prevents Parliament debating matters which have been referred by the House itself to any judicial body for inquiry and report, that part of the rule catering for inquiries under the 1921 Act (which formally were set up by the House, rather than by Ministers), does not appear to carry across to inquiries established by Ministers under the 2005 Act. In any event, the rule is not absolute but subject to the discretion of the Speaker: see, generally, *Erskine May, Parliamentary Practice*, 24th edn. Pages 441-443.

25. Mr Garnham argues that documents put into the public domain by the Inquiry are likely to be assumed by those in Parliament not to prejudice a fair trial and will therefore be considered legitimate material for debate and questions and the more significant the document the greater the likelihood that legitimate public interest will require that debate. He then concludes that there is a real possibility of members of Parliament making comments as to the probative value of various documents and/or guilt of individuals whether currently under arrest or not. Mr Garnham's concern is that this type of comment may very well fall within the principle that statements by public officials as to a person's guilt of a criminal offence may amount to a violation of Article 6(2) of the ECHR and render a fair trial impossible: see *Allenet de Ribemont v France* [1995] 20 EHHR 557 and *Daktaras v Lithuania* [2002] 34 EHHR 60 in which it was determined that prejudicial pre-trial statements by a police officer or other arm of the State could give rise to a breach of an accused person's Article 6(2) rights. Thus, in *Allenet de Ribemont*, a breach was held to have been established after senior police officers and the Minister of the Interior made statements to the effect that the claimant was one of the instigators of the murder of a French MP.

26. There is no doubt that investigations have been undertaken by a number of Select Committees of both Houses. Without seeking to be exhaustive, these include in relation to the House of Commons, the Culture, Media and Sport Committee and the Home Affairs Committee; in relation to the House of Lords, the Select Committee on Communications; additionally, there is the Joint Committee on Privacy and Injunctions. I have no doubt that each of these Committees and its members are acutely conscious of the issue of risk of prejudice and although I recognise that documents might have entered (or might enter) the public domain through this Parliamentary scrutiny, I am sure that not a single member of any of the Committees would wish that anything that he or she said or did should be capable of being used to mount a successful argument that a defendant could not fairly be tried. What I can do is keep a very careful eye on the material which the Inquiry puts into the public domain to ensure that its use by the Inquiry is appropriate, proportionate and in keeping with my own determination not to prejudice the investigation or any prosecution. It is then for Parliament to exercise its own discretion similarly. Suffice to say that I do not consider that this risk is any higher than the risk that is inevitably consequent upon the decision, taken by the Prime Minister, that Part 1 of this Inquiry must proceed forthwith. In my judgment, it is entirely manageable.

Self Incrimination

27. Although s. 21 of the 2005 Act permits me to require a person not only to provide a statement and to give evidence but also to produce any document or anything else required by the Inquiry (with s. 35 providing criminal sanctions in default), s. 22(1) makes it clear that:

> "A person may not under section 21 be required to give, produce or provide any evidence or document if –
>
> (a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom; ..."

28. Thus, I cannot require anyone to waive legal professional privilege (although I have sought voluntary waiver in certain circumstances) and, of greater significance for the purposes of this ruling, no witness is bound to answer any question if the answer to that question would, in my opinion, have a tendency to expose that witness to any criminal charge, penalty, or forfeiture which I regard as reason likely to be preferred or sued for: see *Blunt v. Park Lane Hotel* [1942] 2 KB 253 per Lord Goddard CJ at 257. Further, the phrase 'tendency to expose' demonstrates that it is sufficient to support a claim to privilege against self incrimination that the answers sought might lead to a line of inquiry which would or might form a significant step in the chain of evidence required for a prosecution (per Beldam LJ in *Sociedade Nacional de Combustiveis de Angola UEE v. Lundqvist* [1991] 2 QB 310 at 324) or on which the prosecution would wish to rely in making its decision whether to prosecute or not (per Waller LJ in *Den Norske Bank ASA v. Antonatos* [1999] QB 271 at 289).

29. A full summary of the principles has been provided by Kirby P in the Australian case of *Accident Insurance Mutual Holdings Ltd v. McFadden* (1993) 31 NSWLR 412; in large part these were repeated and "gratefully adopted" by Waller LJ and the Court

of Appeal in *Den Norske Bank ASA v. Antonatos* (*supra*) at 285. It is unnecessary to burden this ruling with a recitation from these authorities but it is worth adding the elaboration that although the privilege must be protected and not abused so that it should only be applied where its invocation is justified (see *Triplex Safety Glass Co Ltd v Lancecgaye Safety Glass (1934) Ltd* [1939] 2 KB 395 at 403) it the balance must be struck because "great latitude should be allowed to [the witness] in judging for himself the effect of any particular question" (*R v Boyes* (1861) 1 B. & S. 311).

30. The concern expressed by Mr Garnham is two fold. First, he makes the valid point that the privilege operates to protect the witness who claims it but does not protect others whom the witness may name. This possibility is nothing to do with privilege against self incrimination but goes back to the risk from adverse pre-trial publicity which I have analysed above. Without being overly sensitive, it is one feature in respect of which care will have to be taken during the course of the evidence.

31. The other concern expressed by Mr Garnham relates to the speculation that will follow should a witness claim privilege against self incrimination. He submits that it is inevitable that were any suspect to refuse to answer questions there would be intense public speculation which the Inquiry would be powerless to prevent. It is suggested that such persons might argue that they had been placed in an impossible position: either waive privilege and rehearse their defence (in ignorance of the case against them) or face criticism for remaining silent in the face of what might seem to be compelling evidence. His solution (as I have set out) is to invite the Inquiry not to take evidence from anyone who is a suspect in the investigation (whether or not arrested). Mr Chawla, for Mrs Brooks, does not go so far as to suggest that Mrs Brooks should not be called but submits that there must be clear and unequivocal guidance as to how the privilege will be respected without running the risk to which Mr Garnham refers.

32. I am not prepared to decline to call every witness who has been arrested or about whom the police express suspicions although, on a case by case basis, I will consider what material each such witness is likely to add not least by reference to the statement that has been made and whether that material itself should (or legitimately could) be the subject of further probing. Where such a witness is called, it may be appropriate to prepare and repeat a formula of explanation which does not vary. It is important to underline that Rule 10(1) of the Inquiry Rules 2006 makes it clear that only counsel to the Inquiry may ask questions although Rules 10(3)-(5) permit me to allow the legal representatives of a witness and of other core participants to ask questions but only having identified the issues to be dealt with. Thus, the questioning of witnesses will be controlled and I will make it very clear that it would be both wrong and unfair to draw any inference from a claim to privilege. I do not accept that this explanation will be ignored or lead to informed criticism of the type suggested. Furthermore, should there be a criminal trial, the warning to the jury not to draw an inference in such circumstances would be a matter of elementary fairness.

The Way Forward

33. Although I can understand the 'zero tolerance' submissions that Mr Garnham has felt it appropriate to advance and the reason for those submissions, I do not accept

that the conduct of Part 1 of this Inquiry is likely to cause a risk of prejudice (let alone serious prejudice) to the investigation or any prosecution although I repeat that I will remain mindful of the concerns of the police and the CPS throughout. The core participants likely to be most antagonistic to those whom the police suspect of crime are those who have become participants because they allege that they are victims either of criminal or, in cases where criminality is not alleged, unethical behaviour at the hands of the press. Not surprisingly, Mr Sherborne on their behalf has made it very clear that his clients want to do nothing to prejudice a prosecution. For News International, Mr Rhodri Davies Q.C. identified three concerns. The first is that any prosecution which the CPS or police think fit to bring should not be obstructed or put in jeopardy. The second is that any procedure adopted by the Inquiry should be fair to ex or current News International staff who face prosecution. The third is that any procedure adopted by the Inquiry should be workable in practice and such as to allow a fair assessment of the facts insofar as they are to be assessed in Part 1 of the Inquiry. I agree with each of these propositions.

34. The fundamental dichotomy is between a requirement to understand and identify the extent to which the print media have been prepared to use illegal or unethical techniques (recognising that there might be an issue about what is illegal, given the public interest defence in relation to data protection, and what is unethical) on the one hand and descending into the detail of specific acts of alleged illegal or unethical conduct (which requires naming names with the possibility of the risks to which Mr Garnham refers) on the other. In avoiding the latter, however, I must not leave the analysis of the former at such a high level that it is open to the criticism that it is insufficiently evidence based to justify reaching conclusions about the adequacy of present methods of regulation and the justifiability of new or different mechanisms. That is so particularly if it could be suggested that any new regulatory system, howsoever devised or organised, could impact adversely on freedom of expression or have a chilling effect on the responsible journalism which is so critical in our democratic society.

35. On the basis that, to date, the primary (but by no means the only) focus of complaint has been on phone hacking activities at *News of the World*, I intend to proceed as follows:

    i) I will receive evidence that is presently in the public domain on any aspect of the Inquiry. I shall also receive evidence from whatever source which may involve allegations either of criminal behaviour that is not presently the subject of police investigation (taking care to confirm the position before placing it on the record of the Inquiry) or of conduct short of allegations of crime but which includes what is said to be unethical practices or conduct which contravenes the civil law.

    ii) In relation to allegations of phone hacking and the present police investigation, I shall ask the police for a summary of the progress of the investigation and a detailed explanation of the extent of unlawful behaviour (if any) for which there is at least *prima facie* evidence along with the identity of those suspected and the nature of the evidence (in general terms). For the public aspects of the Inquiry, I would be content that names are anonymised or given a cipher provided that all are then placed in bands that identify their

comparative seniority in their employing organisation albeit in such broad terms that do not permit further identification. In addition, to ensure that I am being fair to everyone and can place into context any other material I see, I would also require a document that provided the real names of the ciphers although I will make an order under s. 19(2) of the 2005 Act that this information shall not be disclosed or published. If the police consider that some of this overview material should not enter the public domain, that material should be included in a separate document which I shall not allow to enter the public domain without giving the police or the CPS the fullest opportunity to make representations and receive a ruling which could be challenged by way of judicial review.

iii) The notebook belonging to Mr Mulcaire, which has formed an important part of the police investigation, will be summarised so that its true significance and extent may be understood. The personal data of those who are listed in the journal as targets or potential targets shall not be included although names already in the public domain or where consent has been forthcoming may be. The name of any journalist linked with any entry (so called 'corner names') shall also be anonymised or given a cipher although, again, each coded name will be placed in a band that identifies their comparative seniority but in such terms that do not permit of further identification. The Inquiry will be given the names of those to whom ciphers have been attached but I shall similarly direct under s. 19(2) of the 2005 Act that this information shall not be disclosed or published until the conclusion of any criminal trial. Although I appreciate that the investigation is ongoing, I would also be grateful if the police could identify the extent of the operation that involved the interception or potential interception of phone messages along with the present evidence of the first and last known occasions on which activity in furtherance of interception took place.

iv) In relation to any other evidence that the Inquiry has received or receives (from whatever source), if I am concerned that its public deployment might cause particular risks to the investigation (notwithstanding all that I have said above), I shall maintain its confidentiality within the Inquiry team and ensure that the views of the police are canvassed before making any decision about how to proceed. Such a decision would, of course, be formal and potentially capable of being reviewed.

v) I shall make decisions about the identity of those who give evidence with all the concerns set out above in mind: these decisions may well involve discussing the matter with representatives of those who might give evidence if only to learn their attitude to issues such as reliance upon the privilege against self incrimination. I have absolutely no wish to call a witness simply for the purpose of providing a story speculating whether adversely or otherwise about the about the reasons why a witness relied on what, in the present circumstances, is likely to be an undeniable claim to privilege. On the other hand, I will not be prevented from calling a witness whom I believe can assist even if some areas of what might be contentious evidence will be left unexplored.

Consequences

36. It should not be thought that this decision is without consequences, a number of which some might find unpalatable. The first concerns the material that I will deploy in this Part of the Inquiry. If I am concerned that it will shed more heat than light on some aspect of the Inquiry (particularly if the point or issue can be covered in other ways), I shall not deploy it. Neither will I deploy it if, because of its nature or contents, I am concerned that it might, indeed, create a risk of causing serious prejudice to the investigation or any prosecution. The benefit of using any material must outweigh the potential disadvantage and that benefit must be judged against the requirement in Part 1 to consider the culture, practices and ethics of the press with a view to making recommendations in relation to the regulatory regime, mechanisms for dealing with concerns and relationships with the police and with politicians. There will be further opportunities to examine the specifics of the personal conduct of individuals when Part 2 of the Inquiry falls to be considered following the conclusion of police investigations and any prosecution.

37. The same is so in relation to the witnesses who are to be called to give evidence. The purpose of calling for evidence (and subsequently bringing witnesses to the Inquiry to speak in person) is to understand, in a general sense, what has been happening and whether (and, if so, how) arrangements might be made to improve the regulation of the press media in the various areas described in the Terms of Reference. It is not to provide a public platform unfairly to pillory anyone for doing no more than exercising the rights which all of us are afforded. There may thus be what some might consider to be surprising omissions in relation to Module 1 of Part 1 (the press and the public) on the basis that certain individuals who are suspects in the police investigation should not and – given the remit of this aspect of the Inquiry – need not give evidence orally.

38. That is not to say that such witnesses will not be required in relation to other aspects of Part 1 of the Inquiry. As for Module 2 (the relationship between the press and the police), I am unaware of the parameters of what is known as Operation Elvedon; if it requires the same care that I am devoting to the risks concerning the investigation of criminal conduct in relation to interception of communications (Operation Weeting), it shall receive it. The material placed before the Inquiry and the witnesses called will be considered against the same principles. As regards Module 3 (the relationship between the press and politicians), however, there is no suggestion that any investigation will be influenced by the Inquiry. All those who can assist on that topic will be required to do so.

7 November 2011